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No. 90-781

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

141ST STREET CORPORATION, BY MARK HERSH, ETC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court erred in imputing to petitioner its agent's knowledge of and consent to drug trafficking in petitioner's apartment building.

2. Whether the jury at the trial to obtain forfeiture of petitioner's property was properly instructed that petitioner was not an innocent owner of the property unless petitioner could establish that it had done all that reasonably could be expected to prevent the illegal use of its property.

3. Whether due process required that petitioner receive notice of and an opportunity to be heard prior to the government's seizure of petitioner's apartment building.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-29a) is reported at 911 F.2d 870.

JURISDICTION

The judgment of the court of appeals was filed on August 17, 1990. The petition for a writ of certiorari was filed on November 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner's property, a building on West 141st Street in Manhattan, was ordered forfeited to the United States. The court of appeals affirmed.

1. Between December 1986 and May 1988, New York City police received numerous complaints of drug trafficking in petitioner's 41-unit apartment building located at 617 West 141st Street.[1] The complaints alleged that drug activity was taking place in 24 apartments on all six floors of the building. Pet. App. 7a-8a; Gov't C.A. Br. 4. Five search warrants were executed at the building prior to May 1988, and more than 20 arrests had occurred there. Gov't C.A. Br. 4. Investigation of the building revealed that its common areas were littered with crack vials and pipes, that lookouts constantly were posted in front of the building, and that "steerers," who direct drug buyers to sellers, loitered outside the building and in the lobby. Pet. App. 8a.

In 1987, police officers repeatedly attempted to contact Mark Hersh, petitioner's president and principal stockholder. Hersh failed to respond to several telephone calls and to a letter asking him to come to the local precinct house to discuss drug trafficking in the building. Pet. App. 8a. Also during 1987, a police officer spoke to Morris Nahmias, Hersh's uncle and the superintendent of the building, about the drug trafficking there. Nahmias, who also acted as petitioner's rental agent, rent collector, and corporate representative, denied that any drug activity was occurring in the building. *Ibid.*; Gov't C.A. Br. 7. On three occasions, the officer asked Nahmias to tell Hersh to call the officer, but Hersh never called the officer. Gov't C.A. Br. 7. One of the residents of the building complained directly to Hersh about drug dealers on his floor. Pet. App. 17a. Hersh also visited

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[1] The evidence at trial is set forth in the court of appeals' decision and the government's brief in that court.

the building on more than 100 occasions between 1982 and 1988 and spoke with Nahmias on a weekly basis. *Ibid.* Nahmias accepted bribes from drug traffickers to keep the elevators in the building running in order to facilitate drug trafficking, and he charged exorbitant rents to lease apartments solely for the purpose of selling drugs. *Id.* at 16a.

When police officers began an investigation of drug trafficking in the building in May 1988, they deliberately decided not to contact the owners of the building. The officers concluded that, given the level of drug activity at the building and the prior fruitless attempts to contact Hersh, the owners were aware of the drug trafficking and were possibly in league with the drug traffickers. Pet. App. 8a; Gov't C.A. Br. 5.

In May and June 1988, undercover officers purchased crack cocaine in several apartments in the building. During these purchases, the officers learned that an alarm system designed to alert the occupants of the apartments to police presence ran from a central connection box on the roof to eight apartments in the building. Pet. App. 8a-9a. On June 2, 1988, pursuant to a valid warrant, officers searched these eight apartments, found a kilogram of crack cocaine, weapons, and cash, and arrested 26 people. Two weeks later, after additional undercover drug purchases, officers executed another warrant to search nine more apartments in the building, and uncovered four pounds of cocaine, cash, and weapons. *Id.* at 9a.

On June 24, the same day that the second search warrant was issued, authorities obtained a warrant from a United States Magistrate to seize the entire building and the leasehold interests of 15 people in the building. Pet. App. 9a. On June 29, the govern-

ment seized the building, sealed 15 apartments, and arrested 12 persons. *Ibid.*

2. On July 7, 1988, the government filed a complaint seeking forfeiture of the building pursuant to 21 U.S.C. 881(a)(7). Petitioner filed a claim to the building, asserting that it was an "innocent owner" within the meaning of Section 881(a)(7). Before trial, the district court ruled that any knowledge of or consent to illegal activity by Morris Nahmias in the building would be imputed to petitioner, because Nahmias acted as petitioner's agent. Pet. App. 4a, 9a-10a. In the same order, the court denied as untimely a motion by Stanley Weg, who claimed to be a shareholder in the corporation, to intervene in the action. The court also noted that as a shareholder, Weg had no standing to intervene in the forfeiture proceeding. *Id.* at 4a.

At trial, after hearing the government's evidence of drug trafficking in the building, the court held that the government had shown probable cause to believe that the building was used to facilitate felony drug trafficking within the meaning of 21 U.S.C. 881(d). For this reason, the only issue submitted to the jury was whether the narcotics trafficking in the building took place without petitioner's knowledge or consent. Pet. App. 10a.

3. The court of appeals affirmed. Pet. App. 5a-29a. It first ruled that the ex parte seizure of the building on June 29, 1988, did not violate the Due Process Clause. *Id.* at 11a-15a. It found that the government's interest in halting persistent drug dealing in the building, when coupled with Hersh's failure to respond to police inquiries, outweighed petitioner's interest in "ownership and possession of an apartment building solely for commercial purposes." *Id.* at 12a. The court also held that the district court

had not erred in imputing to petitioner Morris Nahmias's knowledge of and consent to drug dealing in the building. *Id.* at 16a-17a.

The court next rejected petitioner's challenge to the district court's jury instructions. It held that the district court properly instructed the jury that petitioner could prevail either by showing that it did not know of drug trafficking at the building or that it did not consent to the drug trafficking. Pet. App. 17a-21a. In addition, the court of appeals upheld the district court's instruction that to show lack of consent, petitioner had to establish that once it learned of illegal conduct, it had done all that it reasonably could to prevent the illegal use of its premises. *Id.* at 21a-24a.[2]

ARGUMENT

1. Petitioner first contends that the district court erred in imputing to petitioner its agent Nahmias's knowledge of or his consent to drug trafficking in the building. Petitioner concedes that Nahmias was its agent, but petitioner claims that Nahmias acted outside the scope of his employment and adversely to petitioner's interests and that, therefore, it should not have been held responsible for his acts. Pet. 8-16. That fact-bound claim is without merit.

Under New York law, an agent's knowledge and actions are imputed to his principal unless the agent has completely abandoned the principal's purpose and acted entirely for his own or another's purposes. See *Prudential Bache Securities, Inc.* v. *Citibank, N.A.*,

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[2] The court also held that Section 881(a)(7) allowed the government to forfeit the entire building on West 141st Street, not just the 15 apartments connected to drug trafficking, and that so construed the statute does not violate the Eighth Amendment prohibition against cruel and unusual punishments. Pet. App. 24a-27a.

73 N.Y.2d 263, 276, 536 N.E.2d 1118, 1125, 539 N.Y.S.2d 699, 706 (1989); *Center* v. *Hampton Affiliates Inc.*, 66 N.Y.2d 782, 785, 488 N.E.2d 828, 497 N.Y.S.2d 898, 900 (1985); *In re Investors Funding Corp.*, 523 F. Supp. 533, 541 (S.D.N.Y. 1980). Here, as the court of appeals held, Nahmias's actions themselves were not adverse to petitioner. Nahmias acted as petitioner's managing agent at the building. In that role, he leased apartments and maintained the building. His involvement in drug trafficking at the building came as part of his performance of these duties. Pet. App. 7a-9a, 16a. In addition, Nahmias derived considerable profit from his illegal activities, and petitioner put on no evidence to discharge its burden of showing that it did not share in these profits. *Ibid.* Moreover, even if Nahmias did not share his excess profits with petitioner, his actions ensured that the apartments in the building remained rented and that rentals continued to flow to petitioner. Thus, he had not abandoned his role as petitioner's agent.

In any event, the court of appeals correctly found that the district court's imputation of Nahmias's actions to petitioner was of no significance because the jury could have concluded that Hersh, petitioner's president and principal stockholder, knew about the extensive and persistent drug trafficking in the building, yet he failed to take any action. Pet. App. 17a. Police officers repeatedly left messages at Hersh's office about the drug trafficking at the building; the officers sent Hersh a letter informing him of the problem and asking for his assistance; a tenant of the building complained to Hersh about drug dealing on his floor; and Hersh personally visited the building frequently and therefore must have seen the clear evidence of ongoing drug trafficking. Accordingly,

the jury had direct proof that Hersh knew and yet did nothing about the drug trafficking at the building. Under these circumstances, it is irrelevant that Nahmias's knowledge and conduct were imputed to petitioner.[3]

2. Petitioner argues that the district court erred by instructing the jury that to show its lack of consent to drug trafficking at the building, petitioner had to establish that it had done all that reasonably could be expected of it to prevent the illegal use of its premises. Pet. 16-18.[4] The court of appeals correctly upheld this jury instruction.

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[3] Petitioner also claims that the district court erred in denying shareholder Stanley Weg's motion to intervene. Pet. 9, 14-15. The district court denied Weg's motion on the ground that it was untimely, however, and petitioner did not raise this issue in the court of appeals. Accordingly, this Court should not consider petitioner's claim. In any event, petitioner's fact-bound claim, which is addressed to the discretion of the district court, see *NAACP* v. *New York*, 413 U.S. 345, 366 (1973) (district court has broad discretion to deny untimely motion to intervene), raises no issue warranting review by this Court.

[4] In relevant part, the district court instructed the jury as follows, Gov't C.A. Br. 23-24 (quoting C.A. Supp. App. 491-492):

> Now, one gives one's consent to something when one voluntarily allows what is planned or done by another or when one agrees or accepts a course of action. You must examine the acts or any failures to act by the claimant, such as what steps it took or might have taken to rid the property of the drug dealers, and determine whether these can be said to constitute the claimant's consent to the use of the premises in the illegal manner alleged.
>
> I instruct you that once an owner or his agent is on actual notice of illegal conduct involving the owner's leased property the owner has a duty to do all that rea-

The forfeiture statute, 21 U.S.C. 881(a)(7), provides for the forfeiture of any real property that is used to commit a controlled substance violation. The statute, however, contains an exception for property otherwise subject to forfeiture if the owner can show that the act giving rise to the forfeiture was "committed * * * without [his] knowledge or consent." In construing the consent element of that exception, the Second Circuit drew upon *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974), which stated in dicta that forfeiture of an innocent owner's property may be unconstitutional if the owner "had done all that reasonably could be expected to prevent the proscribed use of his property." The Second Circuit used that standard to define the absence of consent under Section 881(a)(7), because "it provides a balance between the two congressional purposes of making drug trafficking prohibitively expensive for the property owner and preserving the property of an innocent owner." Pet. App. 22a-23a.

Petitioner contends that the definition of "consent" adopted by the Second Circuit is erroneous because it is not expressly set forth in Section 881(a). Pet. 18. The statute does not define that term, however, and petitioner does not offer an alternative definition. Moreover, the Second Circuit reasonably interpreted that term in a manner that gives effect to Congress's

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sonably could be expected to prevent the illegal use of its premises.

It is for you to decide using your common sense what actions would have comprised a reasonable response by a landlord in similar circumstances. I instruct you that the claimant is not, however, required to take vigilante or lawless actions in connection with any drug activity on its premises or to endanger the safety of its employees or to engage in conduct which would be wholly futile.

purposes. Finally, the standard adopted by the court of appeals does not require a property owner to undertake futile or dangerous efforts to curtail drug activity; that standard only requires a party to undertake reasonable steps toward that end.

Petitioner claims that the standard adopted by the court below conflicts with the standard set forth in decisions of the Third and Sixth Circuits. Pet. 17-18. The Third Circuit case, *United States* v. *Parcel of Real Property Known As 6109 Grubb Road*, 886 F.2d 618 (1989), clearly does not conflict with the decision below, since that court expressly declined to consider whether a claimant asserting an innocent owner defense must show that it did "all that reasonably could be expected." *Id.* at 627. In *United States* v. *Lots 12, 13, 14, and 15, Keeton Heights*, 869 F.2d 942, 947 (6th Cir. 1989), the court stated that Section 881(a)(7) "imposes no requirement that a person who claims the status of 'innocent owner' establish that he has done all that he could reasonably be expected to do to prevent the proscribed use of his property." According to the court, "[i]t is enough, under the statute, that the owner establish that the proscribed act was committed 'without the knowledge or consent of that owner.'" 869 F.2d at 947. That statement, however, was dicta, since the court ruled that the government had not properly put the claimant's knowledge or consent in issue at all. *Ibid.* In addition, the court of appeals evidently considered the "all that reasonably could be expected" standard in the context of the claimant's assertion that she fulfilled that obligation and therefore the property could not be constitutionally forfeited, rather than in the context of an assertion that the standard was an appropriate test for consent under the statute. *Id.* at 946-947. Moreover, the Sixth Circuit did

not explain what are the elements or coutours of the consent standard. When confronted with a case requiring a definition of the absence of consent, the Sixth Circuit may adopt a standard that is indistinguishable from the one adopted by the court of appeals here. Under these circumstances, the Sixth Circuit cannot be said to have fully considered and rejected the standard adopted by the court below. Review of the asserted conflict between the decision below and in *Keeton Heights* would therefore be premature.[5]

In any event, petitioner could not satisfy even the least demanding definition of the term "consent." The government showed that petitioner's agents, including its president and chief shareholder Hersh, knew about a long-standing and virulent drug problem at their building, but did nothing to terminate it. Instead, petitioner's superintendent and rental agent actively sought to further the drug trafficking in the building. Hersh ignored repeated police attempts to enlist his aid in curtailing drug dealing in the building. Indeed, Hersh failed to take any meaningful steps to rid the building of drug dealers after the June 2, 1988, raid on the building. Thus, the government here provided sufficient evidence to allow a jury

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[5] Petitioner also asserts that two district court decisions conflict with the Second Circuit's decision here. See *United States* v. *Premises Known As 171-02 Liberty Avenue*, 710 F. Supp. 46 (E.D.N.Y. 1988); *United States* v. *One 1981 Datsun 208ZX*, 644 F. Supp. 1280 (E.D. Pa. 1986). In the *Liberty Avenue* case, however, the district court found that the property owner had done everything that was *reasonable* under the circumstances; it held that the additional steps that the government argued that the owner should have taken were unreasonable. In *One Datsun 280ZX*, the court found that the claimant had done all that could be expected to prevent the illegal use of the vehicle in question. 644 F. Supp. at 1288.

instructed under a more lenient standard to conclude that petitioner consented to the drug trafficking. Accordingly, because petitioner could not prevail even under the most lenient standard, its claim does not warrant further review.

3. Petitioner contends that the initial ex parte seizure of the West 141st Street building on June 29, 1988, violated the Due Process Clause of the Fifth Amendment. In particular, petitioner argues that it was entitled to notice and a hearing prior to the initial seizure of the building. Pet. 18-21. That claim also does not warrant further review.

The determination of the process due before a seizure of property requires use of the balancing test set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). That test requires a court to evaluate three factors: the significance of the property interest at stake; the risk of an erroneous deprivation through the procedures used and the probable value of additional procedural safeguards; and the government's interest in pre-notice seizure. The court of appeals applied that test in this case and correctly held that petitioner received the process that was due. See Pet. App. 11a-15a.

As the court of appeals found, petitioner's purely commercial interest in the building, although significant, is not of the same weight as a homeowner's interest in his or her property. "An expectation of privacy in commercial premises * * * is different from and indeed less than, a similar expectation in an individual's home." *New York* v. *Burger*, 482 U.S. 691, 700 (1987). Petitioner was deprived only of the income from the property, not of the abode of any of its owners or officers. Second, the risk of erroneous deprivation was minimized by the probable cause hear-

ing before the magistrate. Third, the government had a substantial interest in seizing the building without notice to petitioner. Prior investigation had suggested that petitioner's employees and officers knew of and were involved in the extensive drug trafficking in the building. In addition, the drug trafficking at the building had survived several prior police raids, including a search of eight apartments in the building on June 2, 1988, three weeks before the seizure of the building, that had resulted in 26 arrests and the seizure of several weapons. Thus, seizure of the property without notice not only was necessary to ensure that drug trafficking at the building was finally brought to an end, but also to help ensure the safety of the police officers involved in the June 29 search and seizure and of innocent tenants of the building. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. at 679 (seizure without prior notice justified because seizure prevented further illicit use of the property).

Even if petitioner were correct that it was entitled to preseizure notice, its claim would not warrant review. Just as an illegal arrest does not render a person immune from prosecution, *e.g.*, *New York* v. *Harris*, 110 S. Ct. 1640, 1643 (1990), so, too, the illegal seizure of property does not immunize that property from forfeiture. *United States* v. *Premises and Real Property at 4492 S. Livonia Road*, 889 F.2d 1258, 1265-1266 (2d Cir. 1989); *United States* v. *One 1978 Mercedes Benz, Four-Door Sedan*, 711 F.2d 1297, 1302-1303 (5th Cir. 1983); *United States* v. *One 1975 Pontiac Le Mans*, 621 F.2d 444, 450-451 (1st Cir. 1980); *United States* v. *One (1) 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (9th Cir.

1974). See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984). Petitioner had a full trial on the merits of its claim that the government did not have the right to seize its property.[6] Accordingly, the legality of the seizure has been established at a trial on the merits, and any error in the June 29, 1988, seizure without notice does not undermine the integrity of the judgment entered at the trial. In short, as the court of appeals concluded, "[t]he high level of ongoing narcotics trafficking in the building, coupled with [petitioner's] opportunity to contest the forfeiture at trial [shows] that issuance of the seizure warrant by a neutral and detached magistrate was all the process that was due." Pet. App. 14a-15a. Consequently, petitioner's claim does not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1991

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[6] Petitioner never requested an evidentiary hearing before trial on the merits of the seizure; nor did petitioner move to dismiss the the forfeiture proceeding because of the illegality of the seizure. Gov't C.A. Br. 21.

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